

September 28, 2006

The Honorable Jane Harman  
Ranking Member  
House Permanent Select Committee on Intelligence  
U.S. House of Representatives  
2400 Rayburn House Office Building  
Washington, DC 20515

The Honorable John Conyers, Jr.  
Ranking Member  
House Judiciary Committee  
U.S. House of Representatives  
2426 Rayburn House Office Building  
Washington, DC 20515

RE: Opposition to H.R. 5835, the Electronic Surveillance Modernization Act

Dear Representatives Conyers and Harman:

We are organizations committed to ensuring the protection of our nation's security in a manner consistent with the Bill of Rights and the rule of law. We write to express our opposition to the substitute to H.R. 5825, the "Electronic Surveillance Modernization Act," which the House is expected to vote on today.

Proponents and some press accounts have mischaracterized this bill as providing judicial review of the President's program and as "modernizing" the Foreign Intelligence Surveillance Act. In fact, this bill would prevent meaningful judicial review of the President's program and would both ratify and expand to an unprecedented level the government's authority to wiretap Americans without a warrant.

By defining large categories of electronic surveillance as not being "electronic surveillance" covered by FISA, the bill would permit the National Security Agency to turn its vacuum cleaners on American citizens and create a vast database of information, which the government could data mine at will, outside any judicial or congressional oversight, in a fashion reminiscent of the Total Information Awareness program.

The bill also could immunize from liability any communications service provider who gave the government access to private communications from 9/11 until 60 days after the enactment of the bill. This provision could result in the dismissal of pending cases challenging the surveillance program.

The bill would also authorize warrantless surveillance for indefinitely and secretly renewable periods of 90 days after a terrorist attack on the United States or when the President determines that there is an "imminent threat of attack likely to cause death, serious injury, or substantial economic damage." These terms are not defined and are subject to broad interpretation, creating a dangerous and unpredictable expansion of the President's power to wiretap without a warrant. What's more, these provisions are not necessary. The President already has the authority under existing law to begin surveillance in an emergency (such as the imminent threat of sabotage) before obtaining an order from the FISA court.

None of these changes is necessary to meet the terrorist threat. In fact, after making multiple amendments to FISA since 9/11, the government has all the authority it needs to intercept terrorist communications in a timely and expeditious way without violating the fundamental rights of Americans.

Moreover, the bill does not improve national security. In fact, it actually makes the job of intelligence officials much harder. As a large group of former national security officials, including former directors of the FBI and CIA, stated this week, this bill would leave intelligence officials to operate in a constitutional twilight zone, thereby actually interfering with national security goals.

Sincerely,

American Civil Liberties Union

Center for American Progress

Center for Democracy & Technology

Center for National Security Studies

Electronic Frontier Foundation

Open Society Policy Center